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ABSTRACT

This publication is designed to help members of boards of education understand and work effectively within the requirements of New Jersey's Open Public Meetings Act, also referred to as the Sunshine Law, which requires that the public must be given adequate notice of, and be permitted to attend, meetings of all public bodies empowered by law to spend public funds or affect people's rights. Each provision of the law is discussed separately. The first section defines a "public body" and discusses the conditions that determine whether the law applies to committees, subcommittees, training sessions, joint meetings, and workshops. The second section discusses the public notice requirement, which is satisfied by posting an annual schedule of regular meetings and 48-hour notice of any special meetings. The third section discusses statutory provisions for holding emergency meetings without the required 48-hour notice. Remaining sections discuss statutory provisions for the following: announcements at the opening of meetings that adequate notice has been given, public participation (not required), videotaping of meetings, taking minutes, procedures for closed sessions and subjects that may be discussed therein, and penalties for failure to comply with the law. The closing section, "The Public, The Press, and Boards of Education," provides a set of practical tips for dealing with the press and a list of guidelines for the conduct of public school board meetings. (TE)

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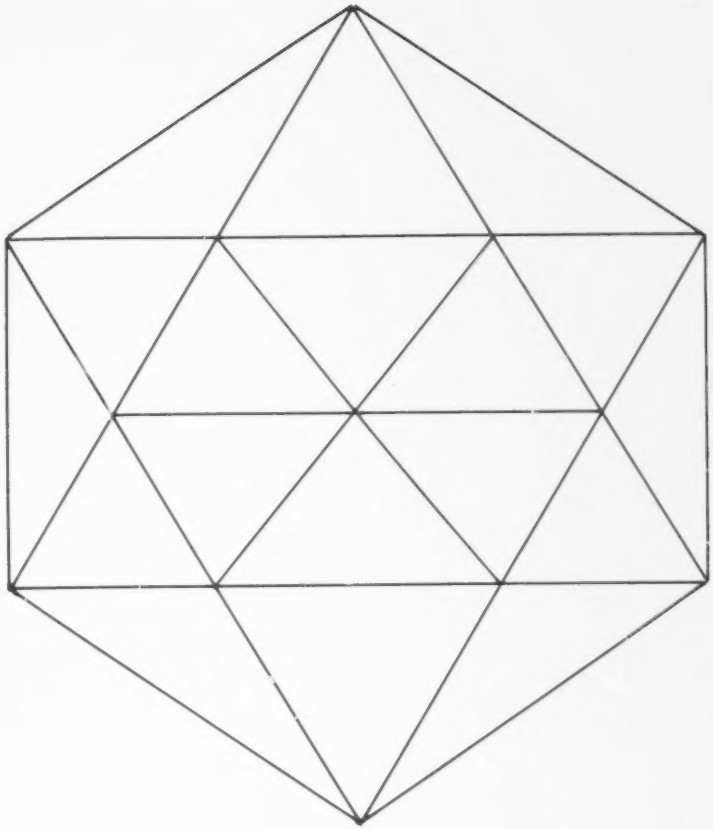

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FOCUS ON:

THE OPEN PUBLIC MEETINGS ACT

THE OPEN PUBLIC MEETINGS ACT

NJSBA

New Jersey School Boards Association
Focus On School Law Series
FOCUS ON: THE OPEN PUBLIC MEETINGS ACT

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TABLE OF CONTENTS

Introduction 5

MEETINGS OF A PUBLIC BODY MUST BE OPEN **7**
Committees, Training Sessions and Workshops 7

PUBLIC NOTICE OF MEETING IS REQUIRED **8**
Annual Notice 8
48-Hour Notice 9
Agenda Requirements 10

EMERGENCY MEETINGS **11**

ANNOUNCEMENT AT OPENING OF MEETING **12**

PUBLIC PARTICIPATION IS NOT REQUIRED **12**

VIDEOTAPING OF MEETINGS **12**

MINUTES OF ALL MEETINGS MUST BE TAKEN **13**

CLOSED SESSIONS **13**
Procedure for Holding a Closed Session 13
Subjects Which May Be Discussed in Closed Session 14

FAILURE TO COMPLY WITH THE LAW **18**

THE PUBLIC, THE PRESS AND BOARDS OF EDUCATION **19**
Dealing With the Press 20
Some Do's and Don'ts for the Board 20

INTRODUCTION

The Open Public Meetings Act, *N.J.S.A.* 10:4-6 et seq. was signed into law by Governor Brendan Byrne on October 21, 1975. The purpose of this publication is to help members of boards of education understand and work effectively within the requirements of the Open Public Meetings Act, also referred to as the Sunshine Law. All boards of education, as well as almost all other public bodies, fall under its provisions. By taking a positive approach and by planning ahead, the open sessions can become a mechanism for strengthening the relationship between the board and the total community.

The Sunshine Law covers all public bodies organized by law and collectively empowered as a voting body to spend public funds or affect people's rights. The public must be given adequate notice of and be permitted to attend any gathering which falls within the definition of a "meeting" under the Act. All discussions and official actions of the public body must take place in public. In this way, the public is given access to all phases of deliberation, policy formation and decision-making of the public body. The Sunshine Law does contain certain exceptions. These specific statutory exceptions relate only to those matters where the public interest would be endangered or the personal privacy or guaranteed rights of an individual would be unduly invaded.

Despite the apparent straightforwardness of the law, there are many unanswered questions concerning its application. These unclear areas will be touched upon and dealt with as effectively as possible. However, please note that the materials contained herein are not meant nor should they be regarded as a legal opinion. Specific facts and circumstances arising under the Act should be referred to your local board attorney for advice and direction.

Included within this publication are references to court cases and other publications. The citation form which will be used throughout is as follows:

N.J.	— New Jersey Reports
N.J. Super.	— New Jersey Superior Court Reports
N.J.S.A.	— New Jersey Statues Annotated
A.G.F.O.	— Attorney General Formal Opinion
Guidelines	— Guidelines on the Open Public Meetings Law published by the Department of State (1983)

MEETINGS OF A PUBLIC BODY MUST BE OPEN

In enacting the Sunshine Law, the Legislature declared that secrecy in the management of public affairs undermines the public faith, interest and participation in government operations. Therefore, the public must be given advance notice of and the opportunity to attend meetings of a public body at which any business of the public body is discussed or acted upon except in certain limited circumstances.

In order to be covered, the public body must be "a commission, authority, board, council, committee or any other group of two or more persons organized under the laws of this State, and collectively empowered as a voting body to perform a public governmental function affecting the rights, duties, obligations, privileges, benefits, or other legal relations of any person, or collectively authorized to spend public funds." (*N.J.S.A.* 10:4-8(a)). This definition includes school boards. (*Guidelines* p. 3) Specifically excluded from this definition are the judicial branch of the government, grand and petit juries, the State Commission of Investigation, parole boards, political party committees, groups not empowered to act by vote, and informal or purely advisory bodies without effective authority.

A meeting will be covered if it is a gathering open to or attended by all the members of the public body and is held with the intent of discussing or acting upon public business. A meeting will not be covered if it is attended by less than an "effective majority" of the members of the body. (*N.J.S.A.* 10:4-8(b)) The definition of "effective majority" is the number of members that must be present at the meeting in order for the public body to take official action. (*Guidelines* p. 4). therefore, in the case of a 9-member board, an "effective majority" would be 5.

Furthermore, informal social gatherings held without an effective majority or the intent to discuss or act upon public business are not subject to the law. (*N.J.S.A.* 10:4-7; 10:4-8(b); *Guidelines* pp. 3, 5)

Committees, Training Sessions and Workshops

A frequently posed question is whether committees or subcommittees are covered by the Sunshine Law. As originally introduced, the Sunshine Law included in its definition of public body the phrase "any committee composed of members of such public body or appointed or established by it." However, as finally enacted, this phrase was deleted. In the *Guidelines*, it is stated that coverage is dependent upon the nature and extent of authority delegated to the committee or subcommittee. A committee set up to investigate and recommend, without effective authority to act, would appear not to be covered. (*Guidelines* p. 3)

In A.G.F.O. 19-1976, one of the questions dealt with was whether meetings of various committees of the State Board of Education and local boards of education must be open to the public. The opinion states than an answer in the abstract cannot be formulated. If the committee is made up of an effective majority, clearly it would be subject to the law. But when the committee is composed of less than the effective majority, the determination depends upon the legal and practical effects of the decisions made by that committee. If the decisions are purely advisory in nature and cannot officially affect persons' rights or the spending of public monies, the committee is not subject to the law. However, where the decision is in the nature of binding formal action, then the committee meeting must be open. For example, if an agenda committee (composed of less than an effec-

tive majority) serves a purely administrative function and merely determines the items of discussion for agenda purposes, the meeting need not be open. But if the committee discusses each item and makes decisions on the merits and then has the effective authority to determine whether or not an item appears on the agenda, this committee is acting in more than an advisory capacity and would be subject to the provisions of the Sunshine Law. Thus, the title of a meeting (i.e. "work session," "agenda committee meeting,"etc.) is not the determining factor or even relevant to the question of coverage. It is the nature and extent of authority possessed by the committee which is controlling.

In this same Attorney General Opinion, the issue of training sessions and workshops was addressed. The opinion states that simply calling a gathering a training session will not exempt it from coverage under the law. If the session is open to all members of the board and is held with the intent of discussing the business carried on by the public body, it is subject to all the provisions of the Sunshine Law. The only exceptions would be if less than an effective majority attended these sessions or if they were attended by or open to all the members of three or more local boards of education, such as at a convention or similar gathering. (See *N.J.S.A.* 10:4-8(b))

A court has held that a joint discussion meeting, to which all members of several public bodies are invited for the purpose of discussing public business of mutual concern, is subject to the requirements of the Sunshine Law. (*Allan-Deane Corp. v. Bedminster Twp.*, 153 *N.J. Super.* 114 (App. Div. 1977), certif. den. 74 *N.J.* 272 (1977)). In so ruling, the court expressly disapproved an earlier trial court decision suggesting that the Sunshine Law did not cover a joint meeting of more than one public body. (*Woodbury Times v. Gloucester Co. Sewerage Authority*, 151 *N.J. Super.* 160 (Law Div. 1977), aff'd 158 *N.J. Super* 448 (App. Div. 1978)) In the *Woodbury Times* matter the appellate court issued its opinion after the decision in *Allan-Deane.* The court agreed with the *Allan-Deane* case as the applicability of the Sunshine Law to joint meetings of more than one public body, although it affirmed the decision of the trial court on other grounds.

PUBLIC NOTICE OF MEETING IS REQUIRED

One of the basic requirements of the Sunshine Law is that adequate advance notice of the meetings be available to the public. There are two types of notice which may be provided in order to satisfy the notice requirement: annual, and adequate or 48-hour notice.

Annual Notice

Annual notice means that at least once each year, within 7 days following the annual organization or reorganization meeting, or if there is no organization or reorganization meeting, no later than January 10, the public body must establish, for the purpose of public inspection, a schedule of the regular meetings of the public body to be held during the succeeding year. This notice must be posted and maintained throughout the year in at least one public place reserved for this type of announcement, mailed to the designated official newspapers, and submitted to the appropriate state, county or municipal office. (*N.J.S.A.* 10:4-18). In addition, all persons requesting that a public body mail them a schedule of meetings must be sent a copy of the annual notice. (*N.J.S.A.* 10:4-19). If any changes oc-

cur, within 7 days the revision shall be posted, mailed and submitted in the same manner as cited above. (*N.J.S.A.* 10:4-8(d); 10:4-18). The annual notice must contain the time and date of each meeting, and the location to the extent it is known. Unlike 48-hour notice, annual notice need not contain an agenda. (*Witt v. Gloucester Cty. Bd. of Chosen Freeholders*, 94 *N.J.* 422 (1983)). Also, proper annual notice of a regular meeting eliminates the necessity for 48-hour notice for that same meeting. (*Witt v. Gloucester Cty. Bd. of Chosen Freeholders*, supra). However, boards should take note that 48-hour notice of a regular board meeting, including the publication of an agenda, is not precluded by any case or other authority should the board wish to provide that courtesy to the public.

48-Hour Notice

Adequate or 48-hour notice means written advance notice of at least 48 hours, giving the time, date, location, and to the extent known, the agenda, of any appropriate meeting and stating whether formal action may or may not be taken. Such notice must be provided for any meeting other than a regular meeting for which proper annual notice has been given (e.g. a special meeting). Such notice must also be given for any meeting where the public body intends to meet in executive session exclusively and no resolution has been adopted at a prior public meeting in accordance with *N.J.S.A.* 10:4-13. (A.G.F.O. 29-1976). Adequate notice must be posted and maintained throughout the year in at least one public place reserved for this type of announcement, mailed, telephoned, telegrammed, or hand delivered to at least two newspapers, one of which shall be designated as the official newspaper, submitted to the appropriate state county or municipal office, and sent to those persons requesting that such notices be mailed to them. (*N.J.S.A.* 10:4-8(d); 10:4-19)

As the law is written, the public body is not specifically required to publish its meeting notices in the newspapers, only to transmit the notices to the newspapers. However, the phrase "written advance notice of at least 48 hours" does not specifically state what the 48 hours is in advance of. One possible interpretation is that the notice be placed in the mail a sufficient time in advance of the meeting so as to reasonably expect it to be received by the newspapers at least 48 hours prior to the meeting. (*Guidelines* p. 9) Other interpretations include sending the notice sufficiently in advance for the newspapers to publish it 48 hours prior to the meeting, sending the notice 48 hours in advance of the meeting and sending the notice 48 hours in advance of the publication of the newspaper or of the deadline for receiving materials to be published. A court has held that the provision requires that the notice be sent in time to be published, and not simply delivered to the newspaper, 48 hours before the meeting. (*Jones v. East Windsor Reg. Bd. of Ed.*, 143 *N.J. Super.* 182 (Law Div. 1976), appeal dismissed as moot, 158 *N.J. Super.* 496 (App. Div. 1977.)) It has also been held that where the notice is transmitted to the newspapers at least 48 hours before the meeting, the public body has made every reasonable effort to comply with the law, and its action at the meeting will not be voided simply because the newspaper fails to publish the notice. (*Houman v. Mayor. & Coun. Bor. Pompton Lakes*, 155 *N.J. Super.* 129 (Law Div. 1977); *Worts v. Upper Twsp.*, 176 *N.J. Super* 78 (Ch. Div. 1980)). The *Worts* decision also held that mere transmittal of notice to a newspaper at least 48 hours before a meeting is not enough to satisfy the Act if the public body know or reasonably could have ascertained that the newspaper's publishing scheduled

prevented it from printing the notice 48 hours in advance of the meeting. Thus, under that decision, transmittal on Saturday of notice of a meeting on the following Monday to a newspaper published on a Thursday would fail to satisfy the Act.

Agenda Requirements

Questions frequently arise concerning what an agenda must look like. In common usage, agenda refers to a list of items to be discussed and acted upon, an outline of things to do. Since there is nothing in the Sunshine Law to indicate any special meaning to the word agenda, the Attorney General has stated that the ordinary and understood meaning of the word is to be used. He concluded that agenda refers solely to the list of subject matters to be discussed and acted upon at the next meeting, and does not include the supportive or explanatory materials and reports. (A.G.F.O. 19-1976)

It should be noted that while these explanatory materials may not fall under a notice requirement of the Sunshine Law, they may be considered "public records," as that term is defined in the Right to Know Law, *N.J.S.A.* 47:1A-1 et seq., and thus may have to be made available for public inspection and duplication.

Another aspect of agenda is whether it is meant as a fixed boundary of discussion or a general outline, to which topics may be added. Generally, if possible, all matters not specifically set forth in the agenda should be postponed to another meeting. This is particularly true when the agenda has been part of the 48-hour notice.

However, a court has held that a public body is restricted to acting upon business set forth in its published agenda only "to the extent known" by it as the time of publication of the agenda. Thus, a board can properly act on items not included in the published agenda if the need for action on such matters was not known to the board until the date of the meeting. (*LaFronz v. Weehawkin Bd. of Ed.*, 164 *N.J. Super.* 5 (App. Div. 1978)). The *Guidelines* deal with this question in the following manner: "A public body may discuss or act upon matters raised in open meetings by the public, or raised in open meetings by a member of the public body who did not foresee the item arising at the time the agenda was prepared or who tried and failed to have a matter included on the agenda." (*Guidelines* p. 9).

The agenda required under the 48-hour notice provision must be somewhat specific as to the matter to be discussed or acted upon. For example, where a public body provided 48-hour notice of a special meeting and the agenda stated only that the purpose was to meet with a certain attorney, a court held that the agenda item was insufficient because the meeting was expressly called by the public body to discuss the settlement of a particular case. (*In the Matter of the Application of Monmouth County to Fix The Compensation to be Paid for the Property of Snyder-Westerling Corp.*, 156 *N.J. Super.* 188 (App. Div. 1978)).

As noted above (see Annual Notice and 48 Hour Notice), 48-hour notice need not be provided for a regular meeting for which proper annual notice has been given. Thus, as a general rule, no agenda of such meetings need be published. However, if the public body chooses to publish an agenda for a regular meeting as a courtesy to the public, action taken upon matters not included on the agenda will not be voided by a court unless it finds that the omission was intentional or designed to deceive the public. (*Crifasi v. Governing Body of the Borough of Oakland*, 156 *N.J. Super.* 182 (App. Div. 1978); *LaFronz v. Weehawkin Bd. of Ed.*, supra)).

EMERGENCY MEETINGS

The Legislature recognized the possibility of a need to hold an emergency meeting and statutorily provided for calling one. A public body may hold an emergency meeting without adequate advance written notice if ¾ of its members present vote in favor of holding the meeting and, as soon as possible following the decision to hold the meeting, notice is posted and given by telephone, telegram or delivery to two newspapers, one of which is the designated official newspaper. (*N.J.S.A* 10:4-9). An emergency meeting is defined as one required to be held in order to deal with matters of such urgency and importance that delay for the purpose of providing adequate notice would be likely to result in substantial harm to the public interest. (*N.J.S.A.* 10:4-9(b) (1))

Two cases interpreted what is meant by "substantial harm to the public interest." In *Dunn v. Laurel Springs,* 163 *N.J. Super.* 32 (App. Div. 1978), a town council appointed an individual to fill a vacant council seat at a meeting held without adequate notice. The court held that the election and its expense did not constitute "substantial harm to the public interest" when balanced against the harm done from failing to give adequate notice to the public. The town argued that substantial harm would result if the meeting were delayed to provide notice in that the council would have missed its statutory deadline for filling the vacancy and the vacancy would have to be filled by a municipal election at a cost of $1,200 in public funds.

In another case, *Jenkins v. Newark Bd. of Ed.,* 166 *N.J. Super.* 357 (Law Div. 1978), aff'd 166 *N.J. Super.* 300 (App. Div.1979), the board held a meeting on three-hours' notice, claiming that an emergency existed and that substantial harm to the public interest would result if the meeting was delayed. The board held the meeting to effect program and personnel cutbacks necessitated by a budget deficit and the board asserted that it would have lost some $40,000 per day if 48-hour notice had been given. The court found that the board could have foreseen the need for the meeting in sufficient time to provide the 48-hour notice without this financial loss. The court also found that even if the board did have to bear this financial loss in order to give the 48-hour notice, such a loss did not constitute substantial harm to the public interest, since the cost when compared to board's total budget was miniscule and since the public's right to notice of the meeting was more important.

Prior to following the procedures outlined for an emergency meeting without public notice, therefore, the importance of the issue and the necessity for immediate action should be carefully considered. (A.G.F.O. 19-1976). If a true emergency exists, failure to provide adequate notice will not void the meeting even if the public body could have foreseen the need for the meeting and could have given notice. (*N.J.S.A.* 19:4-9(b) (4)). Once a meeting is called, it is limited to the matters of importance which necessitated the meeting.

ANNOUNCEMENT AT OPENING OF MEETING

At the commencement of every meeting, the presiding person must announce

publicly and have entered in the minutes an accurate statement that proper notice of the meeting has been provided and specifying the time, place and manner in which the notice was provided. If the meeting is one called in response to a crisis, the announcement shall state that adequate notice was not provided, the nature of the urgency, the harm to the public in delaying the meeting, the limitation on the matters discussed at the meeting, the time, place and manner notice was provided, and the exact reason why a need for the meeting could not be foreseen or why the adequate notice could not be provided. (*N.J.S.A.* 10:4-10)

PUBLIC PARTICIPATION IS NOT REQUIRED

All meetings must be open to the public at all times except for those meetings at which certain excepted matters are discussed. However, the right of the public to be present at the meeting should not be confused with public participation. The public body retains the right to permit, regulate or prohibit active participation of the public at any meeting. (*N.J.S.A.* 10:4-12(a))

VIDEOTAPING OF MEETINGS

A court has determined that a local teachers association has the right to videotape the public portion of a meeting of a board of education. (*Maurice River Bd. of Ed. v. Maurice River Teachers Assoc.*, 193 *N.J. Super.* 488 (App. Div. 1984)). As a result a board of education cannot prevent the local association from making a visual record of board proceedings which are held in public. In *Maurice River* the court also determined that the board was entitled to adopt policy which sets forth reasonable guidelines concerning the videotaping process. Specifically noted by the court as proper subjects for those guidelines were: the number and type of cameras permitted, the positioning of the cameras, the activity and location of the operator, lighting and other items deemed necessary to maintain order and to prevent unnecessary intrusion into the proceedings, and the disposition and safekeeping of tapes as well as the circumstances under which they should be made available to the general public. The court further held that a guideline should be adopted which provides for the interruption of video coverage at the request of a parent who wishes to discuss a personal matter with the board pertaining to a pupil in the school system and a video recording could be embarrassing or humiliating if played at a later time. Note that this list of subjects was not meant to be exclusive. A board may adopt other reasonable guidelines concerning the videotape process. In the absence of board guidelines, the videotaping process will be governed by the Supreme Court's guidelines for camera and audio coverage of proceedings in the courts. Although the Supreme Court guidelines are not necessarily disadvantageous to boards, it is advisable for a board to adopt its own guidelines which may be broader in scope and more particularly adapted to its individual situation.

MINUTES OF ALL MEETINGS MUST BE TAKEN

Minutes must be kept of all meetings, which at a minimum must include the announcement of the presiding person at the commencement of the meeting, the time and place of the meeting, the names of the members present, the subjects considered, the actions taken and the vote of each member on any items voted upon. (*N.J.S.A.* 10:4-14) A board may not utilize a secret ballot for the election of board officers at the organization meeting. (*Mackenzie v. Princeton Regional Bd. of Ed.*, unpublished opinion, Law Division, (Docket No. L-35698-76 P.W., decided September 23, 1977); *N.J.S.A.* 10:4-14). Although a roll call vote may not be legally required, if a roll call vote is necessary to accurately record the vote of each member, it must be done. (*Guidelines* p. 15).

Minutes must be taken in open and closed session meetings, but the minutes of a closed session may be withheld from disclosure until the reason for discussing a matter in closed session no longer exists. (*Guidelines*, pp. 14-15). All others must be made available to the public as soon as they are prepared. If release of the minutes takes place prior to their formal approval, a statement should be placed at the top of them stating that the minutes have not been formally approved and are subject to change or modification by the public body at its next meeting. (*Guidelines* p. 15)

CLOSED SESSIONS

The Sunshine Law declares that, as a general rule, all meetings of public bodies must be held in public. However, there are certain limited exceptions to that general rule. A public body may lawfully hold a closed session if the procedure set forth in the Law for holding a closed session is followed and if the matter to be discussed falls within exceptions contained in the Law.

Procedure for Holding a Closed Session

Prior to going into private session, a public body must adopt a resolution at a public meeting stating the general nature of the subject to be discussed and stating as precisely as possible the time and circumstances when the discussion can be disclosed to the public. (*N.J.S.A.* 10:4-13) (See, for example, *Cole v. Woodcliff Lake Bd. of Ed.*, 155 *N.J. Super.* 398 (Law Div. 1978)). If this resolution is passed at a prior public meeting for which notice has been provided, the public body may hold a meeting limited to the matter to be dealt with in closed session without providing additional notice therefor. (*Houman v. Mayor & Coun. Bor. Pompton Lakes*, 155 *N.J. Super.* 129 Law Div. 1977)). In the event a resolution has not been passed by the public body at such prior public meeting, the public body must then provide adequate or 48-hour notice of the meeting and at that meeting pass the required resolution in open session prior to going into closed session. (A.G.F.O. 29-1976; *Cole v. Woodcliff Lake Bd. of Ed.*, supra)

It is absolutely critical that the resolution stating that the public body is going into closed session be passed. Failure to comply with this prior condition can result

in all actions emanating from the closed session being declared void.

For example, in *Spizzirri v. West Paterson Bd. of Ed.*, unpublished letter opinion, Passaic County Dist. Ct. (Docket No. 58472, decided June 10, 1976), the Board met in closed session to discuss personnel matters without first passing the required resolution. At a subsequent public meeting, the board announced the termination of several employees. The court found that the closed session was improper because the required resolution had not been passed. Since the termination of employees had emanated from an improperly-held closed session, the court voided that action.

In another case, *Oliveri v. Carlstadt-East Rutherford Reg. Bd. of Ed.*, 160 *N.J. Super.* 131 (App. Div. 1978), although the board failed to comply with the resolution requirement, the official action taken was not voided. At a public meeting, the board passed a resolution which notified all employees of a possible reduction in force. At the conclusion of the meeting, the board's president announced that the board would meet in closed session to discuss personnel matters. No formal resolution was passed prior to the closed session. At a later public meeting, the board, by resolution, terminated several employees. As in the *Spizzirri case*, suit was brought to invalidate the terminations on the theory that this action emanated from a closed session held without the required resolution. The court, however, upheld the validity of the terminations. The decision was based on the first resolution referred to above, which gave notice to employees of possible terminations. The court felt that this resolution, coupled with the announcement made prior to the closed session, remedied any procedural deficiency of the closed session caused by the failure to pass a formal resolution. Consequently, the court upheld the board's action to terminate staff.

Another court case discusses the sufficiency of a resolution for closed session. In *Houman*, supra, a resolution for a closed session was held to be adequate, even though it was not specifically disclosed that the question to be discussed involved the retention of legal counsel. However, the resolution failed to disclosed that other issues would also be discussed in the closed session. As to these issues, the court found that the resolution was not sufficient under *N.J.S.A.* 10:4-13. However, the public body subsequently remedied the defective resolution by taking corrective action and none of the actions emanating from the closed session were voided.

Subjects Which May Be Discussed In Closed Session

Only the types of matters specifically listed in the law may be discussed in closed session. All other matters, regardless of their controversial nature, must be discussed in public. Any matters which are not included in one of the exceptions and which are discussed in a private session, are subject to challenge and can be set aside. This is true even if the vote is taken in public. (See *Accardi v. Mayor and Coun. of North Wildwood*, 145 *N.J. Super.* 532 (Law Div. 1976)). The law appears to give the public body the option to discuss all matters in public if it so desires. (See, for example, *West Orange Ed. Assn. v. West Orange Bd. of Ed.*, unpublished opinion, Law Division, (Docket No. L-19411-77, decided July 6, 1978)). Once a matter is discussed at a private session, there is no set rule to determine when disclosure shall take place. The nature of the matter is critical. A general guide would be that disclosure to the public may be made when the reasons for going into private session no longer exist. (*Guidelines*, p. 13). According to two court decisions, exempt matters may only be discussed in closed session; final action

must be taken at an open session. (*Houman v. Mayor & Coun. Bor. Pompton Lakes*, 155 *N.J. Super.* 129 (Law Div. 1977); *Jones v. East Windsor Reg. Bd. of Ed.*, 143 *N.J. Super.* 182 (Law Div. 1976), appeal dismissed as moot, 158 *N.J. Super.* 496 (App. Div. 1977)). This interpretation appears to be at odds with the published *Guidelines* p. 13 which indicate that if a matter is within one of the exceptions, the board may both discuss and act upon the matter at a closed session, subject to the usual requirements of timely disclosure.

There are basically nine exceptions to the requirement of holding an open meeting.

1. Any matter which by express provision of federal law or state statute or rule of court shall be rendered confidential. An example of this exception is found in *Cirangle v. Maywood Bd. of Ed.*, 164 *N.J. Super.* 595, (Law Div. 1979), where the court held that a tenured employee has no right to demand a public discussion of tenure charges filed against him, since *N.J.S.A.* 18A:6-11 specifically states that "the consideration an actions of the board as to any charge shall not take place at a public meeting."

2. Any matter in which the release of information would impair a right to receive funds from the Government of the United States.

3. Discussion of any materials, the disclosure of which would constitute an unwarranted invasion of individual privacy. This section also states that if the individual concerned requests in writing that the matter be disclosed publicly, the public body must comply with that request. Therefore, there appears to be an implied duty on the part of the public body to notify the concerned individual sufficiently in advance of the session to afford him or her the opportunity to open up the session.

4. Any collective bargaining agreement, or the terms and conditions which are proposed for inclusion in a collective bargaining agreement, including the negotiation of terms and conditions with employees or representatives of employees of the public body. Thus, under the Sunshine Law, the board has the option of negotiating in public or private session. As a matter of labor law, however, the decision to negotiate in public or private session is a ground rule for negotiations which must be agreed to by both parties at the commencement of negotiations. Even if the board and the union agree to public negotiations, the board retains the right to discuss strategy and the progress of negotiations in private session.

5. Any matter involving purchase, lease or acquisition of real property with public funds, the setting of banking rates or investment of public funds, where it could adversely affect the public interest if discussion were disclosed.

6. Discussion of tactics and techniques utilized in protecting the safety and property of the public, if disclosure would impair such protection. (See, for example, *Woodcock v. Calabrese*, 148 *N.J. Super.* 526 (Cty. Dist. Ct. 1977)). It also includes any investigations of violations or possible violations of the law. This exception could impact upon school districts in terms of their attempts to control the growing amount of violence and vandalism in the schools. It may also apply where the board meets to discuss methods to control the drug and alcohol problems a school may be facing.

7. Discussion of any pending or anticipated litigation or contract negotiation in which the public body is or may become a party. It also covers any matters falling

within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer. The scope of this exception cannot be broadly read so as to include almost any matter the board has to decide.

To invoke the first part of this exception, the public body must either be or expect to become a party to the litigation it wishes to discuss. The mere possibility that the board may become a party to a suit if its decision is appealed will not permit utilization of this exemption to conduct its deliberations in a closed session. The subject matter under discussion must be strategy in the litigation, the position to be taken, the strengths and weaknesses of the position, possible settlements or some other real part of the litigation itself. (A.G.F.O. 30-1976; see *Accardi v. Mayor & Coun. of North Wildwood*, 145 *N.J. Super.* 532 (Law Div. 1976)). Thus, a discussion by borough council of its anticipated litigation before the State Division of Tax Appeals was held to be within this exception. (*Houman v. Mayor & Coun. Bor. Pompton Lakes*, 155 *N.J. Super.* 129 (Law Div. 1977)).

The same type of reasoning applies in terms of utilization of the attorney-client privilege in order to go into private session. The general rule is that communications made between a client and a lawyer in the course of a professional relationship are privileged. The mere physical presence of the public body's attorney at a meeting is insufficient to invoke this exception. It is only those discussions and consultations with the attorney which relate to the confidential and professional relationship and which the client wants held inviolate because of detriment to his position which are covered by this exception. (A.G.F.O. 30-1976).

8. Any matters involving employment, appointment, termination of employment, terms and conditions of employment, evaluation of performance, promotion or disciplining any prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individuals whose rights could be adversely affected request in writing that such matters be discussed at a public meeting.

An unreported court case dealt with the utilization of the exception. In the case of *Spizzirri v. West Paterson Bd. of Ed.*, unpublished letter opinion, Passaic County Dist. Ct., (Docket No. 58472, decided June 10, 1976), the board went into private session to discuss reduction of its teaching staff and the particular employees who would be terminated. The court held that the board violated the Sunshine Law by failing to pass a public resolution prior to going into private session. The court went on to state that discussion of a reduction in force would not in any event fall subject to this or any other exception. The court explained that in the context of a reduction in force this exception is strictly limited to the decision to terminate specific individuals.

In this section, there again is the ability to force discussion into the open by written request of those persons to be affected. The public body is required to provide the employees concerned with reasonable notice of its intention to consider in closed session personnel matters related to them in order to allow them to exercise their statutory right to request that they be considered in a public session. (*Rice v. Union Cty. Reg. High School Bd. of Ed.*, 143 *N.J. Super.* 64 (App. Div. 1977), certif. den. 76 *N.J.* 238 (1978)).

In the case of *Jones v. East Windsor Reg. Bd. of Ed.*, 143 *N.J. Super.* 182 (Law Div. 1976); appeal dismissed as moot, 158 *N.J. Super.* 496 (App. Div. 1977), the board's action of going into closed session to interview applicants for a vacancy

on the board was challenged. The board asserted that a public body may exclude the public from that portion of a meeting where there is discussion of any matter involving the appointment of a prospective public officer or any matter, the disclosure of which may unduly invade the privacy of an individual. The court held that questions of individual privacy could have arisen during any of the interviews and thus the Sunshine Law was not violated by interviewing at a closed session.

Jones should be compared with *Gannett Satellite Information Network, Inc. v. Board of Education of Borough of Manville,* Law Decision, opinion not approved for publication as of the date this booklet went to press (Docket No. L-72452-84 P.W., decided November 30, 1984). In *Gannett* the board had filled a board vacancy pursuant to an appointment process (i.e. interviews, deliberations, nominations and voting) conducted entirely in executive session. The court held that the appointment process violated the Sunshine Law and set aside the board's action.

The *Jones* case should also be compared with *Manahan v. Montville Twp. Bd. of Ed.*, unpublished opinion, Morris County Dist. Ct., (Docket No. 153936, decided October 18, 1979). In that case, the board met twice in closed session to discuss nominations for president and vice-president, and was charged with violating the Sunshine Law. The board argued that discussion of nominees for board offices could be carried out in private under this same exemption. The court noted its agreement with the ruling in *Jones* that the exemption covers the appointment of private citizens to vacant seats on the board. It ruled however that the exemption was not intended to apply to already elected public officials. The court reasoned that a public discussion of nominees for board offices would not constitute an unwarranted invasion of privacy since, as elected board members, the nominees are already in the public eye.

The *Manahan* case appears to be somewhat at odds with *Jones* in its holding that discussions of candidates must be held in public. The *Manahan* case is also directly contrary to an earlier court decision holding that the exemption in this section did permit private discussion of nominations to board offices. (*Mackenzie v. Princeton Reg. Bd. of Ed.*, unpublished opinion, Law Division (Docket No. L-35698-76 P.W., decided December 23, 1977)). Further judicial interpretation of this issue will be necessary before a clear rule will emerge.

9. Any deliberations of public body occurring after a public hearing that may result in the imposition of a specific civil penalty or suspension or loss of a license or permit belonging to an individual as a result of an act or omission for which the individual is responsible. A civil penalty has been held by a court to include discharge, suspension or reduction in rank in the case of a police officer. (*Della Serra v. Bor. of Mountainside,* opinion approved for publication but not published by the date this booklet went to press, Appellate Division (Docket No. A-3203-82T3, decided February 28, 1984)). The *Della Serra* matter further determined that the deliberation exception may be utilized by a public body even if the individual requested a public hearing under the personnel exception to the Act.

FAILURE TO COMPLY WITH THE LAW

Any person who knowingly violates any of the provisions of the law is subject to a fine of $100 for the first offense and no less than $100 nor more than $500

for any subsequent offense. (*N.J.S.A.* 10:4-17). Members of the public body may be held individually and personally responsible for this fine. (*Guidelines* p. 16)

A court has held that in order to impose fines, it would have to find that members of the public body knew or should have known that their actions violated the law. Where board members acted in conformance with the state of the law as it stood under a prior court decision, the court did not find a "knowing" violation of the law and thus did not impose any fines on the member. (*Manahan v. Montville Twp. Bd. of Ed.*, unpublished opinion, Morris County Dist. Ct., (Docket No. 153936 decided October 18, 1979)).

Any action which has been taken by the public body at a meeting which did not comply with the provisions of the law is voidable in a proceeding in the Superior Court. The court action may be brought by any person within 45 days after the action sought to be voided has been made public.

A public body may take corrective action by acting "de novo" (i.e., a second time) at a subsequent public meeting held in conformity with the law. (*N.J.S.A.* 10:4-15(a)). Corrective action will ratify action taken in violation of the Act. For example, where a borough council appointed an attorney in closed session, the court held that the decision to hire the attorney was indeed formal action and as such, should not have been made in closed session. Thus, the Sunshine Law was violated. However, the court concluded that by adopting a resolution confirming the appointment at a later public meeting, the board had corrected the procedural violations of the initial appointment. The court found that *N.J.S.A.* 10:4-15(a) specifically provides for this kind of remedial action. (*Houman v. Mayor & Coun. Pompton Lakes*, 155 *N.J. Super.* 129 (Law Div. 1977)).

Corrective action by a public body may, under certain circumstances, be found to be effective retroactively. (See for example *Precision Industrial Design Co. v. Beckwith*, 185 *N.J. Super.* 9 (App. Div. 1982), cert. denied 91 *N.J.* 545 (1982); *Houman v. Mayor & Coun. Pompton Lakes*, supra). Such a corrective action validates the initially defective action from the date the defective action occurred. In other instances corrective action will be effective only from the date of the correction. (See for example *Johnston v. Bd. of Ed of Ringwood Bor.*, opinion not approved for publication as of the date this booklet went to press, Appellate Division (Docket No. A-1695-83-T3, decided October 10, 1984).) The effective date of a corrective action will depend on the circumstances presented. If the issue is litigated the courts have broad authority to issue remedies necessary to insure compliance with the Act. (*N.J.S.A.* 10:4-16).

There is no specified time limit as to when corrective action may be taken by a public body. (See *N.J.S.A.* 10:4-15(a)). One court has sustained corrective action taken almost one year after the defective proceeding. (*Atlantic City v. Atlantic Deauville Inc.*, 5 *N.J. Tax* 459 (1983)).

If an action of the board is challenged within the 45 day time limit established by statute, the issues to be determined are first, whether any or none of the meetings were held in conformity with the law, and second, whether the board subsequently acted at a meeting in compliance with the law. It will be up to the board to present convincing arguments establishing the validity of its actions.

If a member of the pubic body believes a meeting is being held in violation of the Sunshine Law, he should immediately state this belief at the meeting and also state the reasons why he holds this belief, which must be recorded in the minutes. If the majority of those present at the meeting overrule his objections, the meeting may continue and the objecting member may continue to participate without ex-

posing himself to personal liability. (*N.J.S.A.* 10:4-17)

Strict adherence to each of the statutory provisions is required by the courts in determining whether a violation of the law has occurred. Substantial but less than perfect compliance with the law is not sufficient. However, once the court has determined that a violation has occurred, it may consider the nature, quality and effect of the violation in fashioning the corrective measures or remedy which it will order. (*Polillo v. Deane,* 74 *N.J.* 562 (1977)).

The Commissioner of Education has concurrent jurisdiction to decide Sunshine law issues that arise in connection with a controversy under school laws. (*Sukin v. Northfield Bd. of Ed.*, 171 *N.J. Super.* 184 (App. Div. 1979); *Coulter v. Caldwell-West Bd. of Ed.*, 1979 *S.L.D.* (November 8)).

THE PUBLIC, THE PRESS AND BOARDS OF EDUCATION

The Sunshine Law, properly implemented and coupled with a sound public relations program, can be an effective vehicle for both improving the image of a local board of education and insuring a full hearing on all issues which come before the board.

One of the keys to successful compliance with the law is the adoption of appropriate policy and workable procedures for conducting all meetings open to the public. The policy statement should incorporate the board's philosophy concerning public participation at public meetings. Established procedures should include provisions for public participation. The procedures should include such specifics as time period for public participation, length of time allocated each speaker, and areas of concern that may be addressed at specific times during the meeting. Boards should also adopt guidelines to govern the use of videotape equipment during its proceedings. Procedures should be set for the distribution of agenda and related meeting materials. The parliamentary procedure under which the board operates should be explained to the public. An explanation of the matters that will not be discussed in an open public meeting should be clearly delineated to the public in the form of written board policy. The NJSBA has available sample policies for conducting meetings "in the sunshine."

It is the responsibility of the president to insure that board discussions are maintained in an orderly fashion. During work sessions, the specific activities of the board should be explained to the public and press. If, for instance, a board is involved in open discussion or brainstorming, such should be noted. Suggestions and/or statements made in a work session by individual board members should be identified as discussion. Board members may play "devil's advocate" for the sake of bringing out all aspects of a problem or issue. If such tactics of discussion are explained to the public and the press by the president, the board's direction and goals should be well interpreted.

Dealing With the Press

The job the press is to inform the public of the activities of the board. To do so, representatives of the press must have adequate, accurate information. A board can and should do much to assist the press.

Some practical tips for the board to follow:

Personal contacts with representatives of the press *should be established. Feel*

free to arrange personal meetings to get better acquainted with individual reporters and editors.

***Provide them with information** and explain the circumstances leading to a decision.*

***Don't wait for the press to come to the board**—extend invitations to them. Provide them with a period of time following the board meeting to ask questions and clarify subjects discussed at the meeting.*

***It is the board's responsibility to insure that the press is given accurate information** and that channels are open for them to question what they have heard or read.*

Some Do's and Don'ts for the Board

- Do provide the physical comforts the board gives itself at work sessions to the public attending.
- Do insist that all members of the public identify themselves before speaking.
- Do listen and learn from the public. Interested parties can often provide a different perspective that will shed additional light on a subject.
- Do seat board members around a table where cross-discussion is convenient.
- Do alert the superintendent to conflicts of questions which may raised at a meeting.
- Do have a prepared agenda for all meetings.
- Do make as much of the board's material available to the public as possible.
- Don't make personal attacks.
- Don't have side conversations.
- Don't expect the superintendent to know everything--encourage staff members to attend meetings and provide input through the superintendent.
- Ask for an answer at a future meeting if he/she cannot supply it immediately.

Above all, encourage free expression and remember that everyone is human—from individual board members—to the press—to the public at large. No one can be expected to say the right thing at the right time all the time. With good preparation and leadership, open public meetings will be as great a benefit to board members as to the entire community.

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